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No. 87-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

DUQUESNE LIGHT COMPANY

AND

PENNSYLVANIA POWER COMPANY,
Appellants,

v.

DAVID M. BARASCH,
CONSUMER ADVOCATE, *et al.*,
Appellees.

On Appeal from the Supreme Court of Pennsylvania

BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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QUESTIONS PRESENTED

The Edison Electric Institute adopts the questions presented set forth in the brief of appellants Duquesne Light Company and Pennsylvania Power Company.

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BRIEF OF EDISON ELECTRIC INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

The Edison Electric Institute (EEI) hereby submits its brief *amicus curiae* in support of the appeal filed by Duquesne Light Company and Pennsylvania Power Company.[1]

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[1] EEI has obtained the written consents of all parties to this case. The written consents have been filed with the Clerk of this Court.

INTEREST OF *AMICUS CURIAE*

EEI is the national association of investor-owned electric utility companies in the United States. Its members supply electric service to consumers throughout the United States, serving approximately 97 percent of all customers of the investor-owned segment of the industry and 73 percent of the nation's electricity customers.

The Pennsylvania Supreme Court has held that the Pennsylvania Public Utility Code and particularly Act 335 (as incorporated in the Code as 66 Pa.C.S. § 1315) governing the determination of rates by the Pennsylvania Public Utility Commission (PUC) precludes any recovery through rates of costs of planning, engineering and preliminary procurement prudently incurred by Appellants in carrying out their obligation to provide necessary and adequate facilities, when the projects for which such costs were incurred were prudently canceled by reason of changed circumstances. As so construed by the Pennsylvania Supreme Court, the Pennsylvania statute resurrects the pre-20th century practice of direct legislative determination of utility rates by specific tariffs or specific formulae which ignore the constitutional constraints upon such governmental actions.[2]

In recent years, there have been many cancellations of electric generating plant construction projects in which, in the aggregate, billions of dollars had been invested by the date of cancellation. In the great majority of such cases, commissions and courts have allowed recovery *of*

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[2] *Smyth v. Ames*, 169 U.S. 466 (1898), upon which the Pennsylvania Court purports to base its decision in this case in large part, involved, for example, a Nebraska statute prescribing classifications of freight and rates for intrastate railroad transport. Similarly, *Covington & Lexington Turnpike Rd. Co. v. Sandford*, 164 U.S. 578 (1896), involved a Kentucky statute prohibiting a turnpike company from charging tolls in excess of the rates specified therein.

the prudent investments made in such canceled projects.[3] However, as here, state legislatures have more frequently enacted statutes which, as construed by the courts of those states, have limited the authority of public utility commissions to allow recovery of any portion of such costs, without consideration of the constitutional limitations upon the unbalanced results of such action.[4]

The fact that this Court has not heretofore fully addressed on the merits such state legislative and judicial actions has been viewed by some as a demonstration that "[t]he Constitution no longer provides any special protections for the utility investor," *Dayton Power & Light Co. v. Pub. Util. Comm'n*, 4 Ohio St.3d 91, 447 N.E.2d 733 (1983), and as providing *carte blanche* to state legislators to deny utility investors recovery of the prudent investment that the utilities previously made in response to their statutory obligations to serve and, as here, spe-

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[3] Such recovery of the investment in canceled projects is typically permitted by the allowance of charges for amortization of the prudent investment over a period of years without any return *on* the unamortized investment, although some jurisdictions (*e.g.*, New York and Wisconsin) have permitted both return of, and on, the prudent investment. After lengthy rulemaking proceedings, the Federal Energy Regulatory Commission recently issued an order authorizing amortization charges *of* one-half of the investment, but also authorizing return *on* that one-half of the investment. *New England Power Co.*, 42 FERC ¶ 61,016, *reh'g granted* (1988). The result is essentially equivalent to allowance of recovery *of* the entire investment without any return on the investment.

[4] *See, e.g.*, Ohio and Indiana, whose statutes were involved in appeals to this Court that were dismissed for want of a substantial federal question or properly presented federal question. *Office of Consumers' Counsel v. Pub. Util. Comm'n*, 67 Ohio St.2d 153, 423 N.E.2d 820 (1981), *appeal dismissed*, 455 U.S. 914 (1982); *Cleveland Elec. Illuminating Co. v. Pub. Util. Comm'n*, No. 82-165 (Ohio, July 7, 1982), *appeal dismissed*, 459 U.S. 1094 (1983); *Citizens Action Coalition of Indiana, Inc. v. Northern Indiana Pub. Serv. Co.*, 485 N.E.2d 610 (1985), *appeal dismissed and cert. denied*, —— U.S. ——, 106 S.Ct. 2239 (1986).

cific public utility commission directives. In the last term, this Court struck down an effort by a state agency to confiscate private property in the guise of conditioning a building permit. *Nollan v. California Coastal Comm'n*, —— U.S. ——, 107 S. Ct. 3141 (1987). This case demonstrates the nationwide need to similarly preclude direct confiscation of private property in the guise of public utility regulation.

This appeal represents a critical juncture both for the nation's investor-owned electric utilities and for the constitutional rules fashioned by this Court. For the Fourteenth Amendment to have meaning and continuing validity as a check on state ratemaking authority, the Court must remind state courts and regulators that the investor interest articulated by this Court in *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), is more than a hollow phrase.

As the national association of investor-owned electric utilities, EEI represents the interests of companies throughout the country whose future rate cases may well be affected by the decision in this case. This brief *amicus curiae* presents, from the perspective of those companies which have committed substantial investment in new generating facilities pursuant to state-mandated obligations to serve, the reasons why the "used and useful" test cannot be determinative under the Constitution and this Court's decision in *Hope*, of investors' rights to recover their prudent investment. This Court's decision will be highly significant to the privately-financed electric utility industry and the long-term costs to consumers served by it. In light of the recent trend in state court and commission decisions, as reflected in the decision below, it is essential that the balancing required under *Hope* include consideration of factors contributing to a continued supply of investment capital at reasonable costs.

SUMMARY OF ARGUMENT

The Pennsylvania Supreme Court has leapt backwards over intervening decisions of this Court to rely upon outmoded ratemaking concepts in order to sustain the constitutionality of a state law interpreted to preclude decisions of the Pennsylvania Public Utility Commission (PUC) that fairly balanced the interests of utility ratepayers and investors as required by *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). The court below seized upon the "used and useful" doctrine, having its origins in *Smyth v. Ames*, 169 U.S. 466 (1898), to overturn the result of the *Hope* balance struck by the PUC permitting Appellants a constitutionally required return *of* their investment in canceled generating plants. Yet, while not acknowledged by the lower court, this Court in *Hope* freed public utility commissions and state courts from the shackles of *Smyth v. Ames*, requiring commissions instead to reach an "end result" that reflects a balance between the interests of investors and ratepayers. The lower court's attempt to resurrect that ancient past, particularly where application of the earlier ratemaking doctrine reaches a result inconsistent with the requirements of *Hope*, must not go uncorrected.

In relying upon pre-*Hope* decisions of this Court to uphold the constitutionality of Act 335, the Pennsylvania Supreme Court failed to respond to the balancing required by *Hope* and struck by the PUC and to consider the factors pertinent to that balance. For example, construction of generating facilities was encouraged at the national level and insisted upon at the state level. Throughout the process of planning for and cancellation of the subject facilities, the prudent nature of the investments was undisputed. The costs of planning, engineering and preliminary procurement were initiated by the utilities in recognition of their obligation to provide their customers with continuous, reliable electric service. Not until almost three years after cancellation of the

projects by Appellants was Act 335 adopted by the Pennsylvania Legislature.

As a consequence of ignoring this Court's teachings in *Hope*, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and *Fed. Power Comm'n v. Memphis Light, Gas & Water Div.*, 411 U.S. 458 (1973), the Pennsylvania Supreme Court, unlike the Pennsylvania PUC, failed to reach an end result that reflects a balance between the interests of ratepayers and investors that is just and reasonable. Under the factors present in this case, the Pennsylvania Supreme Court decision striking down the PUC rate determination that allows recovery of prudently incurred investment fails to comply with the teachings of this Court and must be overturned.

ARGUMENT

I. THE PENNSYLVANIA STATUTE AS CONSTRUED BY THE PENNSYLVANIA SUPREME COURT REPRESENTS A RETURN TO RATEMAKING BY RIGID LEGISLATIVE FORMULA WHICH IGNORES THE TEACHINGS OF THIS COURT.

In the decision which is the subject of this appeal, the Pennsylvania Supreme Court purported to recognize that:

> the property of a public utility, though devoted to the public service and convenience, is still private property; and neither the corpus of that property nor the use thereof can be constitutionally taken for a compulsory price which falls below the measure of just compensation.

Barasch v. Pennsylvania Pub. Util. Comm'n, 516 Pa. 142, 532 A.2d 325, 335 (Pa. 1987).

In support of what it characterized as "[t]his deeply rooted principle of constitutional law," the Pennsylvania Supreme Court cited numerous decisions of this Court, commencing with *Railroad Commission Cases*, 116 U.S. 307 (1886), through *Fed. Power Comm'n v. Natural Gas Pipeline Co.*, 315 U.S. 575 (1942). It is all the more striking that the Pennsylvania Court did not even cite—let alone attempt to distinguish—the decisions of this Court in *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944), and its progeny, such as *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and *Fed. Power Comm'n v. Memphis Light, Gas & Water Div.*, 411 U.S. 458 (1973).

In so doing, the Pennsylvania Court ignored the developments of the past four and half decades in applying the principles of constitutional law to public utility ratemaking. Instead, the Pennsylvania Court largely parroted *dicta* from decisions of the pre-*Hope* era, without pausing to consider the consequences of its actions.

At this late date, constitutional analysis of public utility ratemaking that rests upon what the Pennsylvania Court characterized as "the landmark case of *Smyth v. Ames*, 169 U.S. 466 (1898)" may have interest for the historian (although its deficiencies are an oft-told tale), but it has little relevance to present-day governing judicial doctrines. Instead, while a legislature or its delegate (a public utility commission) has discretion to select whatever ratemaking methodology or formula that it chooses, the end result of its ratemaking and orders must balance the interests of consumers and investors in the manner delineated by this Court in *Hope*, namely: (1) "to protect consumers against exploitation," and (2) "to promote the 'financial integrity' of the [utility] as measured, not only by revenues sufficient to recover operating expenses and capital costs . . . but also by revenues sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[5]

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[5] This summary of the holding in *Hope* appears in the unanimous opinion of the Court in *Memphis*, 411 U.S. at 465-66.

The opinion of the Pennsylvania Supreme Court also lacks perspective about the role of government in causing the projects that are the subject of this appeal to be undertaken. Here, the "taking" that is the subject of this appeal had its origin in the encouragement at the national level, and insistence at the state level, upon the construction of additional prudent generating facilities. Moreover, at that time, national policy was for a variety of reasons strongly oriented toward nuclear generation.[6]

Before the subject projects were undertaken in 1973, President Eisenhower, each of his successors and the Congress had expressly and repeatedly encouraged the construction of nuclear power plants. At the state level, in the face of rapidly soaring demands for electricity, the PUC, as delegate of the Pennsylvania Legislature, instructed Appellants and other Pennsylvania electric utilities "to add additional generating facilities as rapidly as possible to meet adequately the public demand for service." *Pennsylvania Pub. Util. Comm'n v. Metropolitan Edison Co.*, 47 Pa. P.U.C. 56, 59 (1973). Appellants responded in part by undertaking the four units here involved.

As a result of subsequent unexpected, unforeseeable developments, these governmental initiatives and the actions taken by Appellants in response thereto proved to be unnecessary, and in January 1980 the four nuclear units were canceled. In all relevant proceedings before the PUC and the Pennsylvania courts, the prudent nature of the investments made in connection with these four units was undisputed. Almost three years after such cancellation by Appellants, the Pennsylvania Legislature adopted Act 335. Although the PUC and the Commonwealth Court had construed Act 335 as not precluding[7] the recovery in rates of the subject costs, the Pennsylvania Supreme Court held otherwise in the decision that is the subject of this appeal.

[6] *See, e.g.*, Atomic Energy Act, 42 U.S.C. §§ 2131-34, 2235 (1982); Powerplant and Industrial Fuel Use Act, 42 U.S.C. § 8311 (1982); 16 U.S.C. § 824a(g) (1982); *see also* Federal Power Commission, *The 1970 National Power Survey*, Part I at I-6-1, I-6-5 (1971).

Accepting, as one must, that construction of the Pennsylvania legislation by the highest court of that state, the issue then posed is whether the Pennsylvania Supreme Court is correct in its assertion that the just compensation safeguarded to a utility by the Fourteenth Amendment does not include any return on, or of, property that is not "used and useful" in the public service. As previously noted, the Pennsylvania Court purports to rest that assertion on the pre-*Hope* "fair value" decisions of this Court and did not address the question of whether the end result of its decision would satisfy the *Hope* and *Permian* standards.

The Pennsylvania Court's decision starts with its purported acknowledgment that the Fourteenth Amendment is a constraint on the ratemaking actions of a state legislature and public utility commission. (Although not addressed by the Pennsylvania court, that constraint is applicable to a state court as well.) The Pennsylvania Supreme Court's decision then proceeds with an analysis of the pre-*Hope* decisions of this Court as if they continued to provide an authoritative statement of governing law.

The whole of the discussion by the Pennsylvania Supreme Court of the pre-*Hope* decisions of this Court assumes a unity of principle and application in those decisions that is contrary to fact. During the pre-*Hope* period, commissions and courts (principally the federal

[7] In a concurring opinion, the President Judge of the Commonwealth Court stated, "Serious constitutional problems would be raised by precluding a utility from ever regaining monies prudently invested for the public's benefit." *Cohen v. Pennsylvania Pub. Util. Comm'n*, 90 Pa. Commw. Ct. 98, 494 A.2d 58, 64 (Pa. 1985).

district courts until the enactment of the Johnson Act [8]) struggled to apply a hodgepodge of concepts to regulation of the rates of railroads and other utilities. Valuations of utilities on the basis of fair value, going-concern value and the like proved to be well-nigh unworkable, as did the attempts by this Court to provide formulae or methodologies capable of universal application. Although Justice Brandeis was particularly articulate and comprehensive in his criticism of what had come to pass,[9] he was far from alone. The insistence of the Pennsylvania Supreme Court on attempting to resurrect that discarded past is unfortunate.[10]

The criteria of *Hope* and its progeny, when applied to adequate findings of fact and conclusions of law,[11] make good sense and are susceptible to consistent application. By contrast, it does not make good sense for government

[8] 28 U.S.C. § 1342 (1982).

[9] *See, e.g., Missouri ex rel. Southwestern Bell Tel. Co. v. Pub. Serv. Comm'n*, 262 U.S. 276, 289-312 (1923) (Brandeis, J., concurring).

[10] It is noteworthy that the Pennsylvania Supreme Court focused on what it conceived to be a constitutional requirement limited to property that is "used and useful" for public utility purposes and wholly ignored the rate base, "fair value" criterion that was a part of the pre-*Hope* era decisions. This is a curiously "unbalanced" reading of those decisions.

[11] In *Permian*, the Court emphasized the necessity for adequate findings, stating:

> Judicial review of the Commission's orders will therefore function accurately and efficaciously only if the Commission indicates fully and carefully the methods by which, and the purposes for which, it has chosen to act, as well as its assessment of the consequences of its orders for the character and future development of the industry.

390 U.S. at 792. In this case, the PUC had met that requirement. However, the Pennsylvania Court ignored completely the necessity to do so. The admonitions of this Court in this regard are equally applicable to intermediate appellate courts. *See Memphis*, 411 U.S. at 474.

at one time to insist that investment be made in new facilities requiring long construction periods and then a few years later to reject recovery *of* that investment (let alone return *on* that investment). It makes even less sense for the judiciary to impose that result, as the Pennsylvania Court did in this case.

II. THE DECISION OF THE PENNSYLVANIA SUPREME COURT IMPOSES A FUNDAMENTALLY UNBALANCED RATEMAKING STANDARD.

The "used and useful" [12] concept for determining the composition of rate base is generally viewed (as indeed the Pennsylvania Supreme Court appeared to do) as attributable to the following statement in *Smyth v. Ames*:

> We hold however that the basis of all calculations as to the reasonableness of rates to be charged by a corporation maintaining a highway under legislative sanction must be the *fair value of the property being used by it for the convenience of the public*. And in order to ascertain that value, the original cost of construction, the amount expended in permanent improvements, the amount and market value of its bonds and stock, the present as compared with the original cost of construction, the probable earning capacity of the property under particular rates prescribed by statute and the sum required to meet operating expenses, are all matters for consideration, and are to be given such weight as may be just and right in each case. We do not say that there may not be other matters to be regarded in estimating the value of the property. What the company is entitled to ask is a fair return *upon the value of that which it employs for the public convenience.*

169 U.S. at 546-47 (emphasis added).

[12] As noted below, the *Smyth v. Ames* Court did not employ the term "used and useful," but somewhere along the way that apparently catchy phrase was substituted for the actual phrase employed by the Court. Like most catch phrases, the "used and useful" phrase is less than correct in this situation.

The Court did not in *Smyth* identify the test for determining what "property [was] being used by [the corporation] for the convenience of the public," and indeed, that issue was not presented in *Smyth* or in most of the cases of the pre-*Hope* era cited by the Pennsylvania Supreme Court in which the "used and useful" phrase was glibly employed.[13] Moreover, although the Court in *Smyth* held that the rates prescribed by the Nebraska Legislature were unlawful because they would have deprived the railroads of "the just compensation secured to them by the Constitution," 169 U.S. at 547, the Court did not provide a rationale for limiting rate base to "property being used by [them] for the convenience of the public."

Subsequently, a rationale was supplied by commentators and lower courts, namely, that the utility was entitled to just compensation only for property that was "taken" for the public service and that it could not expect just compensation (*i.e.*, a return) on the investments in property which would not be "taken" because it was not "used and useful."[14] Later, when reproduction cost became the favored method for determining rate base, the rationale for limiting rate base to "used and useful" property was that it would be unreasonable to include in rate base (and burden consumers with the reproduction cost of) property which no one would think

[13] *See, e.g., Bd. of Pub. Util. Comm'rs v. New York Tel. Co.*, 271 U.S. 23 (1926), and *McCardle v. Indianapolis Water Co.*, 272 U.S. 400 (1926), both cited by the Pennsylvania Supreme Court as supporting its view, where there was no issue in this Court's discussions of excluding property as not used or useful.

[14] *See Washington Gas Light Co. v. Baker*, 188 F.2d 11, 18 (D.C. Cir. 1950), *cert. denied*, 340 U.S. 952 (1951), commenting on that rationale and explaining that, with the demise of "fair value," the "used and useful" concept ceased to have any constitutional significance and is now simply one of several permissible tools of ratemaking and one that need not be, and is not, employed in every instance.

of reproducing.[15] *See Washington Gas Light Co. v. Baker*, *supra* n.14.

Thus, with the decision in *Hope*, the necessity to invoke the "used and useful" doctrine disappeared along with the disappearance of the necessity to employ the "fair value" ratemaking methodology required by *Smyth v. Ames*. The *Hope* criteria for ascertaining whether the rates prescribed are "just and reasonable" have no necessary, or even rational, nexus to a rate base determined on the basis of "used and useful" property, as distinguished from prudent investment. Ratemaking was freed from the shackles of *Smyth v. Ames* because, as evidenced by the instant proceeding, the "used and useful" test is not necessarily consistent with the *Hope* criteria.

In light of *Hope* and its progeny, reviewing courts should put permanently to rest the impression that rate regulatory bodies are required to employ the "used and useful" principle as a matter of law, for at least three reasons:

1. The "used and useful" principle is being increasingly invoked to justify a breach of the implicit and fundamental bargain between investors in the securities of electric utilities and the utilities' customers (sometimes referred to by judges and commentators as the "regulatory compact"). It is resulting in the expropriation of millions of dollars of investment with no excuse

[15] In *Los Angeles Gas & Electric Corp. v. R.R. Comm'n*, 289 U.S. 287 (1933)—one of the last cases in which *Smyth v. Ames* was attempted to be applied—the vagaries of such treatment and their rationale were illustrated when the Court upheld a rate order that included in the $60.7 million historical-cost measure of value the $10 million investment in a manufactured gas facility that was being rendered unnecessary by reason of the introduction of natural gas, but excluded such facility from the higher, reproduction-cost measure of value, both of which measures of value were factored into the development of a fair value rate base.

other than the glib "used and useful" phrase.[16] Assuming that rationality will prevail among investors in the long run—whose investment decisions will reflect the increased risk caused by unconstitutional takings—one can anticipate that at minimum the cost of electric power will be increased and, if the trend is carried to its logical extreme, the availability of electricity will be reduced as a consequence of such expropriation.

2. Because the inappropriateness of the "used and useful" principle has not been dealt with forthrightly, it has become a rallying cry for those opposed to current rate increases, no matter how well justified such current increases are, and even for legislation enacted in several states. Moreover, the opinion of the Pennsylvania Supreme Court in this case can only be read as holding that the "used and useful" principle with its *Smyth v. Ames* parentage takes precedence over the balancing requirements of *Hope* and *Memphis*.

3. The "used and useful" principle is inherently asymmetrical and unfair when employed to exclude recovery of prudent investment in assets that are not "used and useful," in conjunction with limiting recovery to prudent investment, rather than current market value, for those assets that are conceded to be "used and useful."

Since *Hope* there has not been a decision of this Court employing the "used and useful" concept as a limitation on utility rates. Moreover, even in those pre-*Hope* decisions of this Court that are cited by the Pennsylvania Supreme Court as a basis for its decision in this case to exclude recovery in rates of the subject prudent in-

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[16] *See Permian*, 390 U.S. at 791 n.60: "The Commission's exercise of its regulatory authority must be assessed in light of its purposes and consequences, and not by references to isolated phrases from previous cases," and *id.* at 775: "[T]his Court does not decide important questions of law by cursory *dicta* inserted in unrelated cases."

vestment, a careful examination discloses that the investments actually so excluded by this Court in those cases were in property that was not, and had never been intended for, use in the utility or regulated business.

Specifically, *Denver Union Stock Yard Co. v. United States*, 304 U.S. 470, 475 (1938), involved a statute authorizing the Secretary of Agriculture to regulate rates for the furnishing of stockyard services. In exercising that authority the Secretary employed a rate base/rate of return methodology. Certain property was excluded by the Secretary from rate base because it was not, and had never been, property "used and useful" for the performance of the stockyard services covered by the regulated rates; *i.e., the excluded property was wholly outside the scope of the statute because it involved an unregulated business.* This was also the situation in *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 56-57 (1936). And in *United Gas Pub. Serv. Co. v. Texas*, 303 U.S. 123, 136, 144 (1938), although the commission and court below questioned the inclusion in rate base of some properties on the ground that they were not used or necessary as standby equipment, such properties were, in fact, included in rate base, albeit at modestly reduced valuations. Finally, in *Natural Gas Pipeline*, 315 U.S. at 590, the statement made about "used and useful" was of a general nature and not reflective of an issue presented in that case.

In the pre-*Hope* period, it may have been conceptually possible to reconcile the exclusion nature of the "used and useful" concept with a "fair value" rate base—*i.e.*, a consistent, after-the-fact basis of valuation was being employed.[17] But, with *Hope*, which is now almost universally implemented in practice (regardless of the

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[17] *See, e.g., McCardle*, 272 U.S. at 410: "It is well established that values of utility properties fluctuate, and that owners must bear the decline and are entitled to the increase."

phrasing of the valuation basis) by a prudent investment before-the-fact basis of valuation, it is asymmetrical and incongruous to apply an after-the-fact basis of valuation only to certain components of that total valuation—*i.e.*, to say that the investor may have included in rate base only the lower of cost or current market value (if any) of each asset, treated separately, and therefore, that the investors must bear the entire loss *of*, as well as *on*, prudent investments in projects which are prudently canceled by reason of changed circumstances.

The three opinions of the *en banc* United States Court of Appeals for the District of Columbia Circuit in *Jersey Central Power & Light Co. v. Fed. Energy Reg. Comm'n*, 810 F.2d 1168 (D.C. Cir. 1987), are illuminating on this score. In the *Jersey Central* case, there was a sharp disagreement among the views expressed by (1) Judge Bork for the majority, (2) Judge Starr in concurrence, and (3) Judge Mikva on behalf of the dissenters. That disagreement centered upon whether the "used and useful" concept precluded a utility from receiving a return *on* its unamortized investment in abandoned utility projects. But all three opinions were unanimous in assuming or holding that the "used and useful" concept does not constitutionally preclude recovery *of* the utility's total prudent investment in a project intended for utility purposes which is canceled. Thus, all three opinions in *Jersey Central* support the view that the Pennsylvania Court was wrong in its assertion in this case that the recovery *of* the subject investment is constitutionally barred by the "used and useful" concept. In fact, the PUC decisions, unencumbered by the "used and useful" doctrine, properly balanced the interests of investors and consumers, and was correct. Recovery of prudent investment in this case is fair, logical and constitutionally required.

CONCLUSION

This Court should make clear that the Pennsylvania Supreme Court erred in applying the Pennsylvania statutes to bar the recovery of prudent investment in costs for plants that because of unforeseeable circumstances were subsequently canceled. Moreover, this Court should recognize that the PUC, by permitting recovery of prudently incurred costs, properly applied the law to the facts of this case in a manner which prevented an unconstitutional taking. Accordingly, this Court should reverse the judgment below, thereby reinstating the decisions of the PUC which conformed to applicable constitutional standards.

Respectfully submitted,

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